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PROPERTY EXEMPT FROM LOCAL ASSESSMENT

It has frequently been held that property exempt from general taxation may nevertheless be subject to local assessment. The property of churches and other public charities is a familiar example. On the other hand, property subject to annual taxation is sometimes exempt from local assessment. Rural property is a case in point. This difference has led to some confusion in the minds of the judges and to conflict in the decisions. It is our purpose to review the Pennsylvania cases involving the property of railroads and street railways, of jails, court houses, schools and other public property, and also of religious and charitable organizations and cemeteries.

"Municipal charges for street improvements, although included within the generic term of taxation, have nevertheless been reduced to a species. Taxation in its largest and most comprehensive sense is now divided into *periodical* taxation for general purposes, as the annual taxes for the support of government, and taxation for special purposes, which is not charged periodically, but only when a special benefit is conferred upon property, which is theoretically, at least, supposed to follow upon an improvement of the street in front of it. *Annual taxes,* therefore, form *one species,* and assessments for street improvements form another. Whether other species will be developed must be left to the evolution of the future."[1]

[1]Opinion of Judge Arnold, Phila. v. N. Pa. R. R. Co., 1 Super., 254.

RAILROAD CASES—THE ROADBED

Let us first examine the railroad cases. The four earliest decisions form what are known as the *"roadbed cases."* Though the reasons given for the conclusion reached in these cases underwent alteration, it continues to be the law, to wit: the road bed of a railroad may not be assessed for any kind of improvement upon an adjoining street.

In the first case, *Phila. v. P. W. & B. R. R. Co.*, 33 *Pa.*, 41, a street was paved where it ran *side by side* with the defendant's railroad and it was sought to charge the defendant with half the cost of it. The opinion of the Supreme Court was brief. Said Lowrie, J., "Their claim has no foundation either in the letter of the law or in its spirit, nor in the form of the remedy. Not in the letter, *because the defendants do not own the land sought to be charged, and have only their right of way over it.* Not in the spirit, because the paving laws are means of compulsory contribution among the common sharers of a common benefit, and as a railroad cannot, from its very nature, derive any benefit from the paving, which *all the rest* of the neighborhood may, we cannot *presume* that the compulsion was *intended* to be applied to them. Not in the form of the remedy, because the execution for this sort of claim is *levari facias,* a writ not commonly allowed against corporations and which would hardly produce much when directed against a public right of way. It would be strange legislation that would authorize the soil of one public road to be taxed, in order to raise funds to make or improve a neighboring one."

The first reason, non-ownership of the fee, was soon held to be immaterial, the same immunity applying to railroads who did own the fee. The existence of benefit as the necessary basis of the assessment has been long abandoned except as a pretty theory, e. g., cemeteries completely filled with graves have been held to be assessable for water pipes, sewers and street paving. As to the form of execution, it would have been time enough for the court to intervene to

control that, when the railroad had failed to pay the judgment.

In 12 W. N. C., 10, it was held that railroad companies are liable to assessment for benefits for street opening, the Supreme Court saying: "We see no reason why the railroad companies should not be liable for any increase in the value of their properties by the opening of the streets in question. *We have nothing to do on the record with the question of how these benefits are to be collected.*"

In these days when assumpsit is usually available as an added remedy, it is curious that an immunity should exist which rests alone on the supposed difficulty of enforcing payment by means of a judgment in rem.

The paving in the above case had been done under an Act of Assembly that directed that the cost thereof "be charged to the *owners of property fronting* thereon, in proportion to the actual front owned by each." Failing to collect from the railroad company, resort was had to the owners of the fee in the land occupied by the road bed, they also being the owners of the land separated from the street only by the railroad tracks. They also resisted payment and the Supreme Court held there was no liability resting upon them to pay. *In Phila. v. Eastwick,* 35 *Pa.,* 45, we have the decision. Read, J., says that a railroad is itself a public highway and "how can it be said that this lot fronts on the Gray's Ferry Road, when its real front is upon *another public highway,* the railroad, forty-seven feet south of it."

We are left to wonder whether the contractor, who did the paving and took the liens in payment, lost half the cost of his work, as well as the cost of his two appeals, or whether he succeeded in collecting the full cost of the paving from those who owned the land on the other side of the street. That this last could have been done, we infer from McGonigle v. Allegheny, 44 Pa., 118, and Levi v. Oakmont Boro, 44 Super., 631. Persons who are so unfortunate as to own land across the street from that acquired by one of the exempt classes of owners enjoy thereafter the exclusive privilege of paying for all improvements to the street.

Paving and sewers may be much more important for the proper enjoyment of the exempt property, e. g., a school, than they would be for the private owners of the land opposite but the school district cannot be assessed for improvements, though made for the special benefit of the school, and now that it is no longer necessary that the property owners petition for the improvement, there seems to be no protection against this obvious injustice. (See Act of May 12, 1911, P. L., 288).

The second railroad case was *Junction R. R. Co. v. Phila.*, 88 *Pa.*, 424. In this case the paving was done on a street that crossed the railroad at right angles and not, as in the preceding case, on a street that ran by the side of the railroad. The crossing, however, was by an overhead bridge and the paving for which the railroad was assessed was all on this bridge. The court below argued that as owners of land above or below the grade of a street are not generally exempt from assessment on this account, and as the railroad owned its road bed in fee, it should pay the assessment. He was reversed, however, Justice Paxson, holding that the exemption of railroads exists regardless of the character of their title, be it right of way or fee simple. He thought the absence of benefit to the railroad justified the presumption that the *legislature intended to exempt* them from assessment, though it had never so declared. He also thought a sale of the fee subject to the possession of the railroad would bring no substantial price, and as the right of way could not be sold in small sections and the operation of the road thus interrupted, the execution of a judgment would not be practicable.

The opinion of Judge Yerkes, is reported in 35 Leg. Int., 192, and in it we find the following: "It may be that any proceedings to enforce the lien would vest a title subject to the easement or the franchise of the company, but that does not seem any reason why whatever interest the company may have in the land in excess of the necessities of the easement should not be subject to lien and levy and sale." This idea, rejected on the appeal by the Supreme

Court, was later adopted in Phila. v. Phila. & Reading R. R. Co., 177 Pa., 292.

Referring to this opinion of Judge Yerkes, it was said by Judge Clayton in Chester City v. C. & D. R. R. R. Co., 5 C. C., 387: "It is very hard to escape from the soundness of the reasoning of the court below yet the Supreme Court disposes of the whole question with the remark that the distinction between the ownership in fee and the easement for railroad purposes is but shadowy. In view of the numerous changes made by the Pennsylvania Railroad Company in straightening its roads and the many abandoned roads all over the State, the right of ownership of the fee is more than shadowy. The elevated roads can and do use the fee for other than railroad purposes. In some places they are used as general storehouses."

The argument as to the probable legislative intent was soon set at rest by a statute in which it was specifically stated that the persons assessable should include "all individuals, incorporated companies and associations having any interest" in the properties abutting on the streets improved and in case the property assessed could not be sold on a judgment, as in the case of a railroad, then its personal property should be sold on a *fi. fa.* The only way to save the railroads was to declare the statute unconstitutional and this the Supreme Court proceeded to do. In Allegheny City v. West Penna. R. R. Co., 138 Pa., 375, that court, again speaking through Justice Paxson, held that a roadbed of a railroad is the one and only species of property that cannot derive benefit from street improvements, though in all other cases the question of benefit could not be raised, there being a "conclusive presumption" that the benefit exists. "In the absence of any such benefit, in a case where *we* can declare as a matter of law no such benefit can arise, *the legislature is powerless to impose such a burden.* It would not be a tax in any proper sense of the term; it would be in the nature of a forced loan and would practically amount to confiscation." In this case, as in the first one, the improved street ran parallel with the railroad and the two differed some twelve to fifteen feet in grade,

so that the want of benefit seemed clear. The railroads had not at that date begun to spend large sums in support of the good roads propaganda, so that the allegation that they had no interest in such improvements sounded the more plausible.

The fourth roadbed case, and the last reported case of this type, is again a case of paving a railroad crossing. This time, however, the paved way was a subway, instead of an overhead crossing. There is no reported case in which the railroad crosses a street at grade. In *Erie v. Piece of Land,* 175 *Pa.,* 523, the Lake Shore R. R. owned the land fronting on both sides of the paving in question and it was occupied by the abutments and embankments supporting their high grade line. In a brief per curiam, the Supreme Court said: "The reason why such property so used, is exempt from taxation as real estate, is that *it is not real estate* but is a part of the corporate franchise. If any part of the ground in question was used for other purposes than as the bed of a railroad, that portion would be liable to taxation." This is the reason given in the line of cases involving the question as to what property is exempt from annual taxation for general purposes and the court confounds the questions of liability to such taxation and liability to local assessment, questions which in many cases receive contrary answers. All three of the reasons advanced in the earlier cases are abandoned, but the court holds fast to the rule that the municipality must pay for the paving of the intersection of a street and a railroad, just as it must pay for the intersection of two streets. Since it is held that the front foot rule allows the assessment of the entire cost of an improvement upon the abutting properties of the non-exempt classes, regardless of the non-existence of benefit equal to the assessment, we may readily have a case of the paving of five hundred feet of street, twenty-five per cent. of which consist of railroad crossing, perhaps at grade, perhaps in a subway or on an overhead viaduct. In such a case, the private owners of the land abutting on the balance of the improvement would have to pay for the work done through the

railroad property as well as that in front of their own property. In its anxiety to avoid inflicting hardships upon the railroads, the court fails to advert to the other alternative of hardship upon the owners of adjacent property. Which is the greater hardship, to make a railroad pave the portion of a street crossed by its tracks, as part of the price of occupying the ground and excluding private owners liable to assessment, or to make the owners of adjacent property pay for such paving, if they wish to cross the railroad on a properly paved way?

RAILROAD PROPERTY OTHER THAN ROADBED

The first case to hold that the doctrine of the preceding cases is to be limited to assessments for improvements adjoining the *roadbed* is the case of *Mt. Pleasant Boro. v. R. R. Co.*, 138 *Pa.*, 365. It did not appear from the face of the claim filed, except inferentially, that it was filed against the roadbed. The lower court struck off the lien, holding that neither the *depot* nor the roadbed was the subject of a municipal lien but the Supreme Court reinstated it and awarded a procedendo that the facts might be shown. The claim was for grading, paving and curbing a *sidewalk* and Justice Paxson declared: *"It is as important to have a well paved walk to reach a railroad station as it is to any other place."* The benefit to the company in such a case being obvious, it was said that ground used for passenger or freight stations was liable to assessment. It is held in other cases that the duty to pave the sidewalk and the right to collect the cost when the duty is disregarded after notice, rest on the police power and not on the power of taxation but Justice Paxson did not refer to this difference, but treated the case as an ordinary one of assessment for a local improvement. Compare Pittsburgh v. Biggert, 23 Super., 540.

In Mt. Joy Borough v. R. R. Co., 11 *D. R.*, 765, a sidewalk was laid along ground owned by the railroad but the tracks were about thirty feet from the street, the intervening ground being used to carry telegraph poles and for a drainage ditch but the railroad declared it had purchased

the ground for additional tracks. The court decided that the exemption of a railroad from liability to assessment for paving the roadway did not carry with its exemption from liability for the paving of the footway, the obligation to pay for the latter being imposed as a police regulation and not under the taxing power. He added, however, that as the use of the intervening ground for tracks was in the uncertain future, the mere declaration of intention to do so was not enough to confer immunity from assessment, even for the improvement of the roadway.

The first clear case of an *assessment under the taxing power* for an improvement adjoining railroad property other than a roadbed grew out of the construction of a sewer in front of the yards leading to the coal wharves of the Phila. & Reading R. R. Co. in Philadelphia. Several liens were filed and resulted in judgments for the plaintiff in the court below. An appeal from our judgment was taken to the Superior Court, and an appeal from another was taken to the Supreme Court. The cases are *Phila. v. Phila. & Reading R. R. Co.*, 1 *Super.*, 236, *and* 177 *Pa.*, 292. It was argued by the counsel for the company that the yards were as necessary to the railroad's enjoyment of its franchise as were the tracks on its main line, and that the use of the ground made it as impossible for the railroad to benefit from the building of the sewer as if it were along the roadbed. Though the opinions of the Superior and Supreme Courts run along different lines, they reach the same conclusion. The assessments were both sustained.

Judge Rice thought it important that the land was owned in fee and that a portion of it was not covered by tracks. He cites many cases to show that as a general rule, a property owner cannot defend a suit to enforce a municipal claim on the ground that his property is not benefited by the improvement, and that the only exception is when the property is of a class as to which the courts can declare as a conclusion of law that no special benefits could accrue to it. The rural property cases and the roadbed cases are of this type. He did not think a railroad yard to be within the exception. As to the tracks

all being essential to the enjoyment of the franchise, he thought that immaterial, for the Reading Terminal is equally essential in the handling of the passenger traffic but it would clearly be liable to a sewer assessment. He examines in detail the reasons for exempting essential railroad property from general taxation and shows that they are not applicable to taxation by local assessment. The difficulty of enforcing the lien, the objection that was successfully urged in the road bed cases, he thought insufficient to invalidate the assessment. He thought the sale could be so controlled by the court as to protect both the city and the railroad. He was not disposed to regard the yards as essential but rather as a convenience merely and he was sure the unoccupied ground could be sold without dismembering the railroad.

The foregoing decision rests on grounds that would make it a controlling authority in any similar case arising anywhere in the State. The Supreme Court, however, decided that the case turned upon a special act of assembly relating only to Philadelphia. The act in question provided that "the offices, depots, car houses, and other real property of railroad corporations situated in Philadelphia, the superstructure of the road and water stations only excepted, are and hereafter shall be subject to *taxation* by ordinances, for city purposes." The purpose of the act was said to be the equalization of the public burden and it was therefore thought that the word "taxation" should be construed to include local assessments. As to the difficulty of enforcing the lien, the court said; "The plaintiff has a lien on the land in excess of that not subject to municipal assessment; a sale of the land passes to the purchaser nothing the lien does not bind; he takes it subject to defendant's easement. * * The road bed running to the river through the yard, being necessary to the existence of the road as a common carrier, cannot be taken from it by a proceeding in rem against the yard; the purchaser takes subject to the easement, etc." Thus the question as to which of the many tracks were main tracks and which

were not, was left for future determination in a contest between the company and the execution purchaser.

The case of *Phila. v. Phila. & Frankford R. R. Co.*, 177 *Pa.*, 300, was decided on the authority of the last case, but Justice Mitchell filed a dissenting opinion, stating that he thought the jury should find whether the premises liened were essential to the franchise or not, instead of requiring the purchaser to buy subject to the risk of its being later decided that the premises were essential and hence not taxable by assessment or otherwise.

Another case of sewerage along a freight depot and yards was before the Superior Court at the same time. It was the case of *Phila. v. N. P. R. R. Co.*, 1 *Super.* 254. It was held to be ruled by the case of the Reading coal terminal just decided.

On June 4th, 1901, (P. L. 364), an act of assembly was passed the fifth section of which provided that "all *real estate,* by whomsoever owned, and for whatsoever purpose used, shall be subject to all tax claims and municipal claims herein provided for." There was no exemption of the right of way of railroad companies. Accordingly the city of Philadelphia proceeded to lay a water pipe on a street and filed liens against the right of way of the P. & R. R. R. Co., where it abutted on the street. The case is reported in *Phila. v. P. & R. R. R. Co.* 38 *Super.* 529. It was held that the assessment could not be sustained, not because a previous act authorizing such an assessment had been held unconstitutional but for the reason expressed as follows: "Prior to the enactment of this statute it has been held that the roadbed or other property of a railroad company essential to the exercise of its franchise was not subject to taxation or municipal charges, while property which was held for mere convenience in the conduct of its business was subject to taxation for both purposes. When the statute in question became a law it had been settled by judicial construction that the words 'real estate' in a tax act did not include land essential to the exercise by a public corporation of its franchises, without which its public duties could not be performed. * * * The Act of 1901 was written in the light of

these decisions, and the words 'real estate' when used therein must be held to have the meaning which had been given to them by the Supreme Court in construing previous statutes authorizing taxation of the same character, *in the absence of a clearly expressed legislative intention* that they should have a different meaning." The Supreme Court decisions cited were cases discussing the liability of the right of way to annual taxes for general purposes and it was taken for granted that exemption from these meant exemption from assessments also. It is possible that the defendant might have found it convenient to secure water from the pipe and it certainly could not have been said with the same assurance that a water pipe could not possibly be a benefit to it, as was said in the other four roadbed cases of the paving of the street. Unless this can be said, the reason for holding the earlier act unconstitutional does not apply and if the legislature should "clearly express its intention," we may find even the right of way of a railroad assessed for water pipes.

The foregoing case was followed without discussion in the case of Phila. to use v. Fairhill R. R. Co., 41 Super., 246. Phila. v. R. R. Co., 15 D. R., 395, is a like case, similarly decided.

To summarize the railroad cases, we may say that no lien can be filed against the roadbed for paving a street that adjoins the roadbed or crosses it above or below the grade of the railroad and the same is probably true, though the crossing is at grade. The exemption extends to assessments for street grading, sewers or water pipes. If there are any cases in which the roadbed may be assessed, they have yet to be developed. We have in mind a street that runs to a railroad station and on this account is much travelled. But for this fact it would not have been paved. The roadbed abuts on one side of the street and is exempt from assessment. The frontage of the station proper on the paved street is relatively very small. If the cost of the paving be assessed on the foot front basis, the owners of the property on the other side of the street will have to pay the entire cost of the paving, though the paving was done

almost entirely for the benefit of the railroad and its patrons. We hope the courts would create an exception to their rule in such a case. We can say no more.

The doctrine of the roadbed cases extends to cases in which there are several tracks, as well as to cases in which there is but one, but doubt arises when some of the tracks are used not merely as sidings for passing trains but for the loading and unloading of cars. If the same track is used for both purposes, its use for passing trains would probably protect it from assessment. If used exclusively for loading or storing cars, it is liable to assessment, as is all ground not occupied at all or that is occupied by stations, warehouses, stockyards, or other appurtenances of a railroad.

Legislation that purports to impose liability to assessment upon the roadbed proper is unconstitutional and if the intention so to do is not clearly expressed, the language will be so construed as to avoid the necessity of holding the act unconstitutional.

STREET RAILWAYS

We have no cases in which the question is presented as to whether a street railway is liable to assessment, when it owns its roadbed in fee or has a right of way running along the side of a street that is improved by local assessment. Presumably the rule adopted in the railroad cases would be applied. We do have a case in which it was attempted to assess a railway company, whose track ran down the center of the street improved. The case is that of *Harriott Ave.*, 24 *Super.*, 597. The street was regraded and $400 benefits were assessed by viewers against the railway company. An answer to the broad question as to the liability of such companies was avoided by holding that the only property assessable under the Act of 1891 is property *abutting* on the improvement and Judge Porter thought this involved only property that touched the improvement on one side and not property that was superimposed upon the improvement and surrounded by it. The question of possible benefit was also discussed. "When it can be declared as a matter of law that no such benefit can arise, the

burden cannot be lawfully imposed. The limit of the assessment is measured by the increase in the market value of the property, caused by the benefit peculiar to it resulting from the improvement. It is manifest that the change in the grade of a street cannot increase the market value of the mere rails, ties and other material which enter into the construction of a street railway." He intimated that the improvement of the street would attract builders and so add to those who would use the railway but this benefit is too remote to be considered. Exceptions to the assessment were sustained on the further grounds that the cost of a second grading cannot be collected by assessment and assessments under the Act of '91 must be against the property and not against the owner, and finally that only real estate is liable to assessment.

The number and variety of the grounds for sustaining the exceptions to the assessment detract from the value of the decision in re the liability of the roadbed of a street railway to assessment but it does decide that under existing statutes the tracks of railway companies and the pipes, poles, etc., of gas, water and light companies are not liable to assessment for change of grade or other street improvement.

A similar case is that of *"In Re Cherry Lane,"* 50 *Pitts., Leg. Journal,* 197. Viewers were appointed to assess benefits for the grading, paving and curbing of a street over which ran a street railway. The railway had an agreement with the municipality by which it bound itself to pay for the paving of a portion of the street. In view of this contract the viewers undertook to assess the railway. But the court held that the act of '91 contained no authority to assess any but *abutting owners,* and that other appropriate remedies were available to the municipality to enforce its contract with the railway company.

When, on the other hand, it is provided in the charter of a street railway company that it "shall be at the entire cost and expense of paving, repaving and repairing that may be necessary upon any street where the tracks of said company may be laid," this operates to relieve the abutting property owner from all liability to assessment for paving

on such a street and he may set up this legislation in a suit by the city against himself to recover the cost of paving. *Phila. to use v. Market Co.*, 154 *Pa.*, 93 *and* 161 *Pa.*, 523. It was objected that the charter was a contract between the State and the company and that the property owners were not parties to it. But it was held that all liability to assessment being of statutory origin, no such liability exists when the duty to do the thing in question is imposed by legislation on other persons. When the property owners have been so relieved of their obligation by the legislature, it cannot be reimposed by councils. A like case is that of Phila. to use v. Bowman, 166 Pa., 393. When, however, the railway assumes the liability for paving to secure the consent of councils, it is competent for councils to relieve it from this liability and the liability of the abutting property owners is restored. It is imposed by the general law as soon as the temporary exemption created by councils is at an end.

It has recently been decided, however, that when a railway company is released from charter obligation to pave streets on which it lay tracks, in return for $500,000 paid by it annually to the city, the liability of abutting property is not restored. "The city must be regarded as having fixed, as the amount which would represent the cost of paving the streets, the large lumping sum which, under the contract, it was to receive yearly, and the city cannot, with propriety, be allowed to collect this sum both from the railway company and from the property owner." See Phila. v. Phila. trustee, 244 Pa., 224, and 23 D. R., 108.

PUBLIC PROPERTY

The Act of March 19, 1903, P. L., 41, contains this provision: "Public property used for public purposes shall not be subject to tax claims or municipal claims." The first case involving property of this class is *McGonigle v. City of Allegheny*, 44 *Pa.*, 118. It held that the whole cost of paving a street must be borne by those who own lots facing city property as "it would be absurd for the corporation to tax itself" for itself It so happened in this case that the city property was a common and the injustice of a double as-

sessment was concealed by declaring that it was "the price he pays for the privilege of an open common in his front." * "The location, which enhances the value of his property, subjects him to a corresponding increase in taxation, and *this is right.*" But when the exempt property is a jail, a market house, a court house, a post office, a cemetery, or a railroad roadbed, is the property opposite enhanced in value by the location of exempt property opposite?

Until 1900 the only other decisions were those of lower courts. In Boro. of Emaus v. Emaus School District, 12 C. C. Reps., 349, it was held that a school district could not be made to pay for the water used in erecting a school building when the water works are municipal property. In Warren Boro. v. Pleasant Bridge Co., 16 C. C., Rep., 44, it was held that a lien for street paving could not be filed against land owned by the borough. In Phila. v. Girard Estate, 9 D. R., 273, it was held that the property of said estate was liable to assessment, though the city was the trustee. "In considering a claim of immunity we look to the property and not to the trustee to see if the property is entitled to exemption. * * * It is the property and not the trustee, which is charged for the improvement. There is no personal liability."

In 1900 two cases of assessment against school property arose. Judge Brown of Pittsburgh held a school district liable to assessment for a fair portion of the cost of a sewer constructed in the street upon which the school property abutted. He relied upon the line of cases that hold that exemption from periodical taxation does not involve exemption from assessment. He thought it necessary to remark that "*Substantial justice is the guiding rule of the courts.*" If the assessment couldn't be enforced by a sale of the school property, he thought a mandamus execution or some other statutory or equitable process would secure payment. See In Re Construction of Sewer on Harding Street, 31 Pitts., Leg. J., (N. S.), 147. The other case arose in Erie and involved a municipal lien for paving the street in front of school property. This court thought that a sale of the property on a levari facios was the only available method of

compelling payment and such seizure and sale he thought would be unlawful. "A municipal lien, being a proceeding in rem, cannot be sustained against the property of a public school district. * * It is not necessary here to decide whether or not the city has any remedy aganist the defendant for the improvement in controversy." He too seems to have thought it a bit unjust to place the entire cost of the sewer on the private owners of land across the street from the school property. See Erie City v. Erie City School District, 23 C. C. Reps., 428. An appeal from this decision was taken to the Superior Court and the decision was affirmed. See 17 Super. Ct., 33. As in the early railroad cases, the court places its decision on the *presumed legislative intent.* "We have not referred to the right of the legislature to adopt laws by which a charge, in the nature of a tax, may be imposed upon public property. We hold only that the act now before us (Act of May 23, 1889, P. L., 288), is not sufficiently explicit to permit the recovery of a judgment by the plaintiff in this case." The act authorized assessing *"any* property abutting on the improvement." It seems that school property must be specifically named to render the legislative intent to assess it clear. The court thought a mandamus execution would have been available to compel payment but added: "It is but the transfer of public funds from one public treasury to another. We will not presume in the absence of explicit enactment, that the legislature intended to authorize so *useless and unreasonable a proceeding."* Perhaps had he owned a lot across the street, he would not have thought the proceeding so useless or unreasonable.

The appeal from the Pittsburgh case was to the Supreme Court and that court also held that school property is exempt from assessment. See *Pittsburgh v. Sub-district School,* 204 *Pa.,* 635. The assessment was made under the Act of 1891, P. L., 75, under which viewers assess each property in proportion to the benefit it derives from the improvement and if the assessments do not equal the cost of the improvement, the deficit must be met out of the general revenues of the municipality. When the assessments are

apportioned by this method the exemption of a property does not add to the burden of the opposite properties as when the foot front rule is used, but it adds to the burden to be borne by the city as a whole. The school of the sub-district was exclusively for the use of residents of that sub-district, and it was argued that to transfer the burden from the sub-district to the city as a whole was to compel taxpayers in a remote corner of the city to share the burden of paying for a purely local benefit. But the Supreme Court thought that as each sub-district in the city would in time benefit at the expense of the whole, the gain and loss would balance in the long run.

Like the Act of '89, construed by the Superior Court, the Act of '91 though providing for the assessment of "any property or properties," etc., was construed as referring only to private property. "If public property purchased by funds raised by taxation is subjected to taxation for a local public improvement, it is the public paying the public,*which clearly discloses the absurdity of the proposition.*" We wonder whether the result might have been different, had the question been first presented to the court in a case involving the foot front rule, with the alterative of transferring the burden from the school district to the shoulders of the other abutting property owners, an injustice that would never be righted, however long the run.

This decision was followed without comment in Scranton v. Scranton School District, 4 Lack. Jus., 367.

All doubt as to the legislative intent to exempt school property was removed by the Act of May 18, 1911, P. L., 352, Sec. 631. It provides as follows: "All school property owned by any school district, real or personal, *that is occupied and used by any school district* for public school, recreation, or any other purposes provided for by this act, shall be and hereby is made exempt from every kind of State, county, city, borough, township or other tax, as well as for *all costs or expense for paving, curbing, sidewalks, sewers or other municipal improvements.* Provided, That any school district may make any municipal improvement, in

any street upon which its school property abuts, or *may contribute any sum toward the cost thereof."*

That the legislature was not unmindful that this exemption of school property would work hardship is shown by the fact that on June 8th, (P. L., 714), of the same year, it passed an act authorizing boroughs to pave streets and collect from abutting owners on the front foot plan. It provided that if both sides of the street were assessable, each side should bear one-third of the cost, the borough paying a third. But where one side is exempt, those on the other side were to pay one half and the borough half. Thus inequality, though diminished, was preserved. Five days after the passage of this act, another was passed, (See Act of June 13, 1911, P. L., 887). It repeals inconsistent acts. It covers the same ground as the Act of June 8th, but it eliminates the provision in the latter act that distinguishes between those opposite exempt property and those opposite assessable property, so that those opposite exempt property must now pay two thirds of the cost of paving in boroughs, whereas those opposite non-exempt property pay but one third. We wonder if many who voted for the later act were not intending to eliminate the inequality of burden in the earlier act, while they unconsciously increased it.

In Harrisburg v. Fuller, 41 C. C., Rep., 449, we find a city going to the extreme of exempting from assessment all private property facing public property. The latter happened to be a park, and instead of paying a double assessment those facing the park escaped all assessment. The ordinance was held valid but its effect upon the size of the assessments upon other properties, under the front foot rule, was not discussed.

To be continued

MOOT COURT

CRAWFORD v. HALBERT

Trespass

STATEMENT OF FACTS

Crawford was employed about dangerous machinery by Halbert. Certain safeguards were absent and he objected to continuing in the employment, unless they were furnished. Halbert agreed that they should be furnished within two weeks. Crawford then agreed to continue to work, but on the next day, met with an accident which would not have occurred, had the safeguards been in place. Suing for damages he is met with the contention that he was negligent in continuing to work with knowledge of dangerousness of the place.

Wilson, for plaintiff.

Kearney for defendant.

OPINION OF THE COURT

POTTER, J. In order that a servant may be relieved from the operation of assumption of risk from a defect complained of and damage of which he was no longer willing to incur, it is essential that his remaining in employment be induced by a promise of the master to remedy the defect, when he would not otherwise have done so. Mureon v. N. Y., etc. Co., 167 Pa., 220. Applying this to case at bar the assumption of risk is relieved by the promise of the defendant to furnish the safeguards.

Where the servant notifies the master of defects and the master promises to remedy them the servant is not guilty of contributory negligence by continuing work for a reasonable time unless the danger is so obvious and imminent that no ordinarily prudent man would do so. Wust v. Erie City Iron Works, 149 Pa., 263. Mestrezat, J., in Webster v. Coal and Coke Co., 201 Pa., 278, says: "Where a servant remains in the service of his master after he has knowledge of the dangerous condition of the place in which he is engaged, he is presumed to assume the risk of danger; but this presumption is rebutted if the master promises to repair the defect and the danger is not so obvious and imminent that negligence can fairly be imputed to the servant for exposing himself to it." These two cases raise the question whether plaintiff was guilty of contributory negligence. Now then in the first place, the burden is on the defendant to prove contributory negligence in such cases (Cooley on Torts, page 703), and in the second place the presumption is, that in the absence of evidence to show otherwise a man is presumed to have used

the ordinary care of a prudent man. If he acted as a prudent man would have done, it follows from the above cases that the danger was not so obvious and imminent as to make the plaintiff guilty of contributory negligence.

It may be argued that you may assume the danger to be obvious and imminent else the plaintiff would not have refused to work and it is a question for the jury. But this is answered by the burden on the defendant of proving contributory negligence.

Judgment for plaintiff because defendant failed to prove contributory negligence and there is no evidence to rebut the presumption that the plaintiff acted as an ordinarily prudent man would have acted.

OPINION OF SUPERIOR COURT

That a workman, dependent on his daily toil for a subsistence, shall be held to have assumed the risks which are known to him, for which asumption he obtains an appreciable compensation, and the motive for which is simply the necessity of working or starving, is one of the barbarous principles which a capitalistic judiciary foisted upon the law.

Some mitigation of the cruelty of the principle was wrought when it was conceded that, if the risk was occasioned by the failure of the master to furnish a safe place, or to render the operation of machinery as little hazardous as possible by the adoption of contrivances, the workman should not be regarded as assuming the risk, if he had received a promise from the employer to adopt proper safeguards, or make proper repairs, and continued in the employ in consequence of this promise, and if continuance in the employ did not "threaten immediate danger;" Meade v. Pittsburgh Railway Co., 223 Pa., 145; a danger "so obviously imminent that any reasonable person must have appreciated it," Id, Hollis v. Widener, 221 Pa., 72; Foster v. National Steel Co., 216 Pa., 279.

In this case, the plaintiff agreed to continue to work for two weeks, within which time the defendant promised to make the needful changes. To work for two weeks with machinery in a dangerous condition, is ordinarily indefensible. The nature of the dangerousness is however not disclosed, and the court could do no better than refer the question of negligence or recklessness to the jury.

The jury has found that the plaintiff did not act negligently or recklessly.

Affirmed.

COMMONWEALTH v. MARTELLO

OPINION OF THE COURT

Stuart, for plaintiff.
Yates, for defendant.

SHELLEY, J. The outcome of the case at bar depends upon the place where title to the barrel of whiskey passed from vendor to vendee. From the facts which have been offered by the prosecution and with which the counsel for the defense agrees, we find that the whiskey was to be delivered in Carlisle, Cumberland Co. We further find that the contract did not specify how that delivery was to be made but that the vendor delivered the whiskey from his place of business in York Co. to Carlisle, Cumberland Co. in his own wagon. This necessarily brings the turning point of the case to the question, whether title passed to the vendee upon the receipt of the letter of acceptance from the vendor, or whether the delivery of the whiskey to Carlisle was an incident to the contract, thus postponing the passing of title until the receipt of the whiskey by Donnely.

A sale being an intangible thing, we must consider the intention of the parties as to where the sale was to be completed. If a part of the contract was to deliver to Carlisle, the sale, under no circumstances, could have been intended by the parties to pass title until Donnely had received the whiskey at his place of business. But was this their intention? Could we not argue just as logically that the delivery to Carlisle was merely a matter of courtesy on the part of Martello in order to induce Donnely to trade with him and to save him, Donnely, the trouble of seeing that the goods in question arrived at his place of business?

Also we find that the contract was for a specific barrel of whiskey and that draws a line of distinction between this case and that cited by the prosecution in 96 Pa., 449. Garbracht v. Commonwealth. Further we find that "if the subject matter of the contract is a specific chattel and the terms are fully agreed upon the effect of such contract is to vest the property or title to the chattel in the bargainee..

From 228 Pa., 188.—26 Sup. Ct., 82.

There can certainly be no doubt that the subject matter of this contract was a specific barrel of whiskey and also that the terms of the sale were fully agreed upon. The facts stating the specific barrel and the price to be sixty (60) dollars. What more could there be to make the contract executory? If this can be considered good law, which we have no reason to believe is otherwise, it follows that the title to the whiskey vested in the bargainee at the time of the receipt of the acceptance from the bargainor.

This idea of the transfer of title to the specific chattel can further be brought to correspond with the case cited by the prosecution of Comm. v. Hess, 148 Pa., 98, which, so far as we have been able to

learn, is considered as the leading case on this question in this State. In that case (supra) we find the law to be that the passing of title on the sale of goods depends on the intention derived from the contract or circumstances. The circumstances from which this intention can be derived are such as actual delivery, weighing and setting aside, etc.

It is by no means a rash conclusion to draw from the facts as presented that this barrel of whiskey was set aside by the defendant as soon as he accepted the offer of Donnely. Do the facts not say a specific barrel? What merchant would accept an offer for the sale of a specific chattel and not label it or put it aside until he could arrange to either deliver it himself or have it delivered to the bargainee? Any other view than this would certainly be inconsistent with the advanced methods of business of the present day merchant.

In Benjamin on Sales (357) we see that the contract to sell and not the payment or delivery is the important element to pass title to the property. If this is the law there is no doubt whatever that the title passed to the bargainee as soon as he received the acceptance from Martello.

Justice Paxton in Commonwealth v. Hess (supra) says the following is the climax of absurdity, "if in pursuance of an order from an adjoining county the bargainee delivers the whiskey to a common carrier for transportation, he is a law abiding citizen, but if he delivers it in his own wagon to the bargainee as part of the contract, he is a criminal." Suppose for instance there was no common-carrier available. Could we logically say that the law will allow a man to contract for the sale of a barrel of whiskey and another to accept the offer and yet not be able to get possession of the whiskey, because, if the vendor delivers it, he will subject himself to a criminal prosecution? We think this is not the intention of the law and altho some of the courts have adopted that view of the matter, we do not feel inclined to follow in their footsteps.

Arriving, as we do, at the conclusion that the intention of the parties was to pass the title to the whiskey as soon as the letter of acceptance reached Donnely, and consequently the sale took place before the delivery of the whiskey into Cumberland Co., it necessarily follows from this conclusion that the indictment must be quashed.

OPINION OF THE SUPERIOR COURT

The barrel of whiskey was specified in the offer. The offer was accepted, and the acceptance was transmitted by mail. The price of the barrel was at once charged to Donnely on the vendor's books. This was a completed sale. Martello was to deliver the whiskey in Carlisle, either by some common-carrier or otherwise, but the delivery was not of whiskey, the property of Martello, until delivery, but of whiskey, that was already the property of Donnely.

We think therefore that, as it is not a crime for A to deliver X's

beer to X, without a license to deliver it, no crime occurred in Cumberland county.

The learned court below properly held that there could be no conviction.

The learned court below does not seem to have had the aid of the very able discussion of "How to Locate a Sale," by Prof. McKeehan, in 16th Dickinson Law Review, p. 89.

TAFT v. NICHOLS

STATEMENT OF FACTS

Taft in this case employed Nichols, who is a civil engineer, to ascertain the boundaries of his lot. Nichols indicated the lines knowing that Taft intended to erect a large residence upon the lot facing the street. The house when erected was two feet back from the line as marked by Nichols. The city authorities finding that the house invaded the street to the extent of two feet required him to remove so much of it as constituted the purpresture. Taft is now suing for the cost of removal and damages.

Basehore, for the plaintiff.

Ingram, for the defendant.

OPINION OF THE COURT

HEMPHILL, J. As far as we have been able to learn in our search through the books, there is no Pennsylvania case in point. There are several cases in which property owners have attempted to recover from the city for damages caused by the erroneous survey of a city engineer, and in these cases it was held that the only action the property owner had was against the surveyor personally. We consequently infer that a right of action does exist. Alcorn v. city of Phila., 44 Pa., 348; Shull's Appeal, 11 W. N. C., 350.

In a careful review of the facts, we cannot find the slightest intimation that the defendant was guilty of open negligence, such as reading the chain wrong or overlooking a lot. To be sure the defendant, having held himself out as a professional man, was bound to exercise reasonable care and skill, or he would be liable for negligence or fraud or want of skill. It would be unreasonable to hold him as insuring the correctness of his work. But it is necessary that a professional surveyor should discharge his duties carefully, diligently, honestly and skillfully, and when he does this he has done all that is required by law. The skill that is required is a reasonable amount of skill and absolute correctness of his work is not the test. 38 L. R. A., (N. S.) 1043—notes. Applying these principles to the present case, has the defendant employed in his work the necessary knowledge and skill to perform the same properly and correctly?

It is an obvious fact that the plaintiff was given a wrong survey and we could easily infer from this that the work was not done prop-

erly, but are we not, by so doing, making absolute correctness the test of the amount of skill the law requires? And such a test is more than the law requires and is unjust; all men are human. We therefore feel bound to hold that the plaintiff cannot recover without proof of want of skill on the part of the defendant. He must show how his work has been defective by extrinsic proof. If lack of skill had been shown, we would have allowed the plaintiff to recover a reasonable sum for the removal of the house and for rebuilding the wall, but could not have found for him general damages.

In Taft v. Rutherford, 66 Wash., 256, which is a case almost on all fours with the one at bar, it was held that one employed to locate the boundaries of a lot upon which, to his knowledge, its owner desires to place a certain character of building, will be liable for the cost of removing the building, in case through his error in making the survey, it is not located on the owner's property." We would undoubtedly follow the reasoning in this case and reach the same conclusion, were it not for the fact that the evidence in this case clearly showed want of skill. The defendant admitted he had made a wrong survey, and it was shown by the evidence that he had overlooked the parking strip or misread the figures on the chain. This was clearly not due care and can be easily differentiated by this from the case at bar..

In Commissioners v. Beebe, 55 Mich., 137, which case was sent up on a demurrer, it was held, "whether he was professional or official surveyor or represented himself as such, his undertaking was that he should bring to the work the necessary knowledge and skill to perform the same properly and correctly, and if he failed so to do, and the employer sustained damage in consequence of such failure, the plaintiff will be entitled to recover."Likewise, as in the case above, the defendant here is specifically charged with negligence and want of skill.

We must therefore render a judgment in favor of the defendant.

OPINION OF THE SUPERIOR COURT

The learned court below decides that the defendant was not liable unless he was negligent, that the burden of proving negligence was upon the plaintiff, and that as there was no proof tending to show negligence there can be no recovery in this case. In this conclusion we concur.

That the gist of the plaintiff's cause of action was the negligence of the defendant in his employment as engineer is well established by the following authorities: Terrie v. Sperry, 85 Conn., 337, 82 Atl., 577; McCarty v. Bauer, 3 Kan., 237; Highway com. v. Beebe, 55 Mich., 137.

That the burden of proving negligence was upon the plaintiff is a fair inference from the remarks of the court in Highway Com. v. Beebe, 55 Mich., 137 and Taft v. Rutherford, 66 Wash., 256, and the drawing of this inference is rendered more justifiable by the fact that in actions to recover damages for injuries caused by the negligence

of members of other professions, e. g., physicians and lawyers, it has been uniformly held that the burden of proving negligence is upon the plaintiff. 4 Cyc.,. 973, 3 A. & E., 384, 30 Cyc., 1584. Wohlert v. Seibert, 23 Super. Ct., 213.

Judgment affirmed.

ROBERTS v. LOOMIS

STATEMENT OF FACTS

A devised a farm to his son Adam for life, with the power to appoint the remainder in fee to whomsoever he would. Five years after A's death, Adam made a mortgage in fee of the land for $5,000 to Roberts. Adam subsequently died devising the farm in execution of the power to Loomis.

This is a scire facias upon the mortgage, naming Loomis as terre-tenant.

Gunter, for plaintiff.

Fanseen, for defendant.

OPINION OF THE COURT

EVANS, J. We will consider the question "Did Adam exercise his power of appointment by mortgaging the land in fee for $5,000, or was it a mortgage on his life estate only?"

To decide this, we must first see what power was given him under the will. If he had a power of sale, this mortgage would in Pennsylvania, have been an execution of the power, at least to the extent of the mortgage.

An absolute and unrestricted power to sell includes the power to mortgage. Zane v. Kennedy, 73 Pa., 182; Asay v. Hoover, 5 Pa., 21; Lancaster v. Dolan, 1 Rawle, 231.

The attorney for the plaintiff cites 16 Cyc., 641, Scott v. Bryan, and McCreary v. Bomberger. These all stand for the proposition that the power to sell includes the power to mortgage. We admitted and would hold this mortgage a valid execution of his power, did we think the testator meant to give him this power of sale.

The power that the "donee" has is a question of intent as expressed in the instrument creating it. 31 Cyc., 1044. Usually a power is given by words which show its extent, such as sell, lease, mortgage, as the case may be. Also a power of sale is often inferred where the provision could not be carried out without it. Tiffany on Real Property, p. 615. But here no power of sale was given nor is it necessary to sell to carry out the provisions of the will. Indeed the intention seems clearly to have been not to give this power or the testator would have given Adam a fee simple or directly stated the power of sale.

But he did not do this and we assume he intended Adam to have only a life estate and to derive no benefit out of the remainder. Therefore to allow Adam to mortgage the whole thing and hold the money to his own use is to allow him to do indirectly what he could not do directly.

Therefore arriving at the conclusion that the mortgage was an improper execution of his power, we hold that the remainder was not affected by it, and the scire facias is discharged.

OPINION OF SUPERIOR COURT

The farm was devised to Adam for life. He received the power to appoint the remainder, in whatever mode, and to whomsoever he would. He could appoint by a mortgage as well as by any other form of conveyance. He could partially or totally exercise the power.

The mortgage must be deemed as made in exercise of the power. It purported to convey a fee. Adam's extate was only for life. The mortgage must be deemed valid.

But the mortgage did not exhaust the remainder. There was still an equity of redemption. There may be successive exercises of a power, and what is not disposed of in the first may be disposed of in a later exercise. The mortgage left still an estate. This residue was susceptible of appointment. As the power was general, it could be exercised whether by deed or by will. The partial exercise might be by deed and the exercise upon the residue, might be by will.

The result is that Robert's mortgage can be enforced against the land. Had the equity of redemption not been disposed of, it would have been enforceable against the heir, for the testator A would have died interstate as to the interest in excess of the mortgage. The devise by Adam simply substitutes Loomis for the heir. Loomis takes only what Adam had the power to give after giving the mortgage.

We must therefore differ from the learned court below.

Judgment reversed with v. f. d. n.

COMMONWEALTH v. SVEDRUP

STATEMENT OF FACTS

Svedrup indicted for murder, is unable to understand English, Italian or Hungarian. Certain English witnesses testify against him where the testimony is not translated into Swedish, because no one is present who understands Swedish. The prisoner is unable to make his wish that the testimony be translated known to the court. An Italian and Hungarian testify against him, their testimony being translated into English. He is convicted. He alleges that he has been deprived of his constitutional right.

Smith, for plaintiff.

OPINION OF THE COURT

Parsons, for defendant.

LEVIN, J. The question to be decided is whether the defendant has been deprived of his constitutional right.

We have found very little authority upon which to base our opinion. Such cases are infrequent, where courts refuse or neglect to furnish some one to translate the testimony of an accused or against the latter. In order to conform with State or the Federal Constitution the courts as a rule provide interpreters so as to inform the accused of the nature and cause of the accusation.

The fourteenth amendment of the constitution reads as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U. S.; nor shall any State deprive any person of life, liberty or property without due process of law."

"In all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of accusation and to be confronted with the witness against him." 6th amendment.

"In all criminal prosecutions the accused hath the right to be heard by himself and his counsel, to demand the cause of accusation against him." Art. 1, sec. 9, Pa. Constitution.

"Due process of law" implies at least a conformity with natural and inherent principles of justice and forbids that one man's property, or right to property shall be taken for the benefit of another and that no one shall be condemned in his person or property without opportunity of being heard in his own defense. Holden v. Hardy, 18 S. C., 383; 169 U. S., 366.

On examining the facts in the case at bar and applying above principle to said case, it is obvious that the defendant was deprived of his "due process of law." The court in above case, defining "due process of law," says: "No one shall be condemned in his person or property without opportunity of being heard in his own defense." This certainly was done in the case at bar. The defendant Svedrup is indicted for murder. He was unable to understand the testimony given against him and either through indifference or negligence the court failed to provide an interpreter so that he might testify himself or make his wish known that the testimony against him be translated. He was convicted of murder without opportunity of being heard in his own defense. Such methods to deprive a man of his life has no precedents. The court could have provided an interpreter, had it wished to inconvenience itself, at any rate the defendant should not have been tried until one was found.

In Ralph v. State, 52 S. E., 297, the court said: "Where a defendant is deaf and can not hear the evidence of the witnesses of the State, the presiding judge should permit some reasonable mode of having their evidence communicated to him. If the prisoner is unable through defects of his faculties to understand the nature of the

proceedings against him, he can not be convicted.

In U. S. v. Noelke, 17 Blatch, 554, the court held that every person has a right to be informed of the nature of the accusation, that is held to mean that the offense must be set out with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged.

In State v. Maumson, 45 L. R. A., 638, the prosecutrix on taking the stand, she being an infant, stated to the court that she was afraid to testify against the defendant. The court therefore ordered the defendant away, out of the sight and hearing of the witness.

The appellate court held "that the lower court erred in ordering the defendant out of sight or hearing of the prosecutrix."

"The accused should not only be within the walls of the court house but he should be present where the trial is conducted, that he may see and be seen, hear and be heard under such regulations as the law has established." Brown v. State, 38 Texas, 483.

"In all criminal prosecutions every man has a right to be informed of the accusation against him." 64 N. C., 74.

In the case relied upon by the commonwealth, Felts v. Murphy, 201 U. S., 123, the accused being deaf could only hear through an ear trumpet. He testified in his own behalf but did not hear the testimony against him. Had he asked for any information the court would have no doubt furnished him with same but he neglected to request the court to inform him of the proceedings and only after the trial when he was informed of the verdict did he complain. The appellate court said: "There might have been an error committed by the trial court, omitting to have the evidence repeated to the appellant as it was given by the witness at the trial, even though no demand of the kind was made by the petitioner or his counsel. The case at bar is altogether different from above case. In the latter, Felts was merely deaf and could have made his wishes known to the court and could have received the necessary information had he wished same through his ear trumpet while in the former case, had he wanted to testify or desired to know what was testified against him, there was no one in court who understood his language.

We therefore hold that the defendant was deprived of his constitutional right and we therefore grant a new trial.

New trial granted.

OPINION OF THE SUPREME COURT

The constitution of Pennsylvania assures to the accused in all criminal prosecutions, the right to "meet the witnesses face to face." This embraces the right to be aware of what the witnesses are saying while testifying, and to cross-examine them. If the prisoner is deaf, the testimony may be written. If he is deaf and blind, or unable to read, a serious difficulty would be presented. A person thus afflicted is hardly superior to the law against homicide. The constitutional

provision is not made to be applicable to cases application of it to which would result in the exemption of guilty persons from penalty.

If it could appear that translation of the testimony into Swedish could not have been with any effort, procured, we should not say that the accused could not be properly tried. The impossibility of commanding the service of interpreters is not clear and the learned trial court has therefore properly awarded a new trial. The violation of what is ordinarily a constitutional right, should not occur, unless the unavoidableness of it appears with the utmost clearness. Cf. Zunago v. State, 63 Texas Crim., 58; 138 S. W., 713.

BYRNE v. HUGHES

STATEMENT OF FACTS

Hughes told a newspaper reporter that Byrne, a minister of the gospel had cheated him, describing the transaction. Hughes knew that he was talking to a reporter and believed that he would cause his paper to print the charge. Hughes did not request the printing of it nor allude to the newspaper. In this action of trespass for a libel, Hughes' attorney asked the court to say that there could be no recovery unless the publication was found by the jury to be false and malicious. The court refused. Verdict for plaintiff, damages $1500.

Rockmaker, for plaintiff.

Wise, for defendant.

OPINION OF THE COURT

PIFER, J. The question presented in this case is whether the court below rightly refused to charge the jury as requested by the counsel for the defendant. The 3rd section of the act of April 11th, 1901, enacts that "In all civil actions for libel no damages shall be recovered unless it is established to the satisfaction of the jury under the direction of the court as in other cases that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper." In Clark v. North American, 203 Pa., 346; Mitchell J., it was held that "where a libelous article refers to a person named or if so written that it will reasonably be taken to refer to him, it establishes legal malice within the meaning of sec. 3 of the Act of April 11th, 1901. The act has not made any changes in the law in this respect.

If an article is libelous per se and is false as to the plaintiff, malice is shown and the burden of defense is upon the defendant."

It is evident that the act does not apply to this case as the facts show that the publication is libelous per se. "Publications charging fraudulent conduct or the uttering of a lie or words imputing dishonesty are libelous per se." 55 L. R. A., 214; 63 Pa., 253; 177 Pa., 620. Nor is it privileged "a communication to be privileged must be made

upon a proper occasion from a proper motive and must be based upon reasonable or probable cause." 111 Pa., 404; 33 Pa., 411.

Hughes knew that he was talking to a reporter and believed that he would cause his paper to print the charge. There can be no doubt as to his malicious intent. "Malice in its legal sense means a wrongful act done intentionally without just cause or excuse and every utterance or publication having the other qualities of slander and libel, if it be wilful and unauthorized is in law malicious and sufficient to support an action." 87 Pa., 385; 111 Pa., 145.

The facts in Tourmaline v. Holmes, Dickinson Law Review, vol. 14, page 165, differ from the facts in the present case in that the defendant really thought he was using the name of an imaginary man, and had no malicious intent. No one's profession, business or means of livelihood was effected from the story of the dreaming editor. In the present case the insult was published with malicious intent and with the particular minister in mind. Would it be justice not to hold the defendant guilty of such a libel? Does the law expose ministers of the gospel, whose position and success all depend on the reputation they have among their fellowmen, to men whose charge when believed will naturally raise the strongest indignation in all who hear them, especially when published in the public press, which is one of the great powers of the day? "Any words spoken of a person's profession, business or means of getting a livelihood which tend to expose him to the hazard of losing his office are actionable." A. & E. Encyc., vol. 18, page 942.

The judgment of this court is that the judgment should be affirmed.

OPINION OF SUPERIOR COURT

Hughes must be held to have published the defamation. He did not request the printing. That was not necessary. He knew he was talking to a reporter, and believed that the reporter would cause the newspaper to print the defamatory article. The causal relation of Hughes to the publication is clear. Wills v. Hardcastle, 19 Super., 525.

The court declined to tell the jury that there could be no recovery unless the publication was found by the jury to be false and malicious.

When a publication is defamatory, its untruth is assumed until its truth is established. The defendant has the burden of proving its truth. There can be a recovery unless the jury finds that its truth has been established. But, to establish the truth is one thing; to prove its falsity is another thing. No burden is on the plaintiff to prove its falsity. If the evidence leaves the jury in doubt whether the imputation is true or false, the plaintiff is entitled to a verdict. To be in doubt is not to find the defamation false. Hence the court properly refused to tell the jury that their verdict must be for the defendant unless they found that the defamatory words were false.